Secession and EU internal enlargement

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How should the European Union (EU) respond to a secession process from a member state when the new state expresses its wish to obtain member status in the EU?
The answer depends on 1) the possibility of the EU changing the attitude it has adopted regarding secession from a member state, which was simultaneously revealed by its "non-immediate entry" attitude toward Scotland and not-so-veiled opposition toward Catalonia, and 2) which conditions should be fulfilled for a secessionist state to be considered a new member state of the EU.

1. Regarding the recent European secessionist movement, Scotland and Catalonia presented themselves as *pro*-European, and they requested independence and immediate entry into the EU as new member states. Nonetheless, both movements have been perceived by EU institutions as a danger to the European Project. The issues at stake are twofold: (a) there is the problem of meeting the conditions of access to the EU as a new member state without complying with the standard procedures of entry set out by Article 49 of the Treaty on European Union, which provides the legal basis for any European state to join the EU, and (b) there is the question of whether the secession of a pro-European minority group would strengthen the Union, inspiring a new process of federalization of the EU.
Any European country may apply for EU membership if it respects the democratic values of the EU and is committed to promoting them. Given that the democratic framework seems to be attractive to recent European secessionist movements, particularly against the anti-liberal stigma that was often attributed to separatist movements[1], and considering that the purpose of recent secessionism movements is to correct the form of the existing state through democratic means[2], it would be important for European institutions to consider internal enlargement[3]. The possibility of the entry of new member states born inside the EU from secessionist processes without the duty for these new states to comply with the conditions set out by Article 49 of the Treaty on European Union should be taken seriously by EU institutions because a seceding region is not in the same position as that of a third country. For example, a) EU law is already applied in those "seceding states"; b) EU citizenship is automatically acquired through member states' nationality and c) there is a pro-European desire to remain inside a supranational political organization[4]. It would be important for EU institutions to consider the previously stated issues to suggest what conditions should be met to accept a new state born from a process of secession as a new member of the EU.

To accept an easier internal enlargement than enlargement to third states, the following should be acknowledged:
(a) EU law already applies in the regions that are seceding, which implies that it is not necessary for a new state to fulfill the accession criteria. The EU's "acquis"—the body of common rights and obligations that are binding on all EU countries—is already accepted in the seceding region. Internal enlargement would ensure

[1] Today the major theories tend to value the connection between democracy and secession, instead of the relation between secession and nationalism, and the *democratic theories of secession* are more suitable for understanding the current stage of secessionist phenomenon. the democratic appeal for this 'secessionism of a new type' is strategic, because the consequences of declaring independence, including recognition by the international community, depend on the way in which the new state was born. The respect for majority rule, in the final analysis, does not affect the final outcome of the secessionist attempt, but it does guarantee that the factual situation, if it manages to produce the requirements of statehood, will not encounter obstacles in the international realm concerning the extension of all sovereign prerogatives and duties to the new subjects.
[2] J. Bengoetxea, *Secession v forceful union. A provisional enquiry into the right to decide to secede and the obligation to belong*, in Closa C., Margiotta C. and Martinico G. (eds), *Between Democracy and Law: The Amorality of Secession*, London, Routledge, 2019: 'When it comes to the normative, practical philosophical debate, claim of sovereign right and the democratic will of the people is the most recurrent argument for secession'. The most important justification for secession relies on the democratic principle, especially when based on a general consensus.
[3] Walker, N. (2017). *Internal Enlargement in the European Union: Beyond Legalism and Political Expediency*. In C. Closa (Ed.), *Secession from a Member State and Withdrawal from the European Union: Troubled Membership* (pp. 32-47). Cambridge: Cambridge University Press.
[4] Cfr. Margiotta C. (2017), *Perchè la secessione fa paura? Un aggiornamento su «l'ultimo diritto»*, 3 *Governare la paura* 37.

that, the day after independence, EU law continues to apply to the same territory that it applied to the day before[5].
Moreover, respect and commitment to the values set out in Article 2 of the Treaty on European Union (TEU) would be demonstrated by the democratic process being followed to become an independent state. The respect for human dignity, freedom, democracy, equality, and the rule of law during the process toward independence should be one of the *sine qua non* for the recognition of independence. Respect for human rights, including the rights of persons belonging to minorities[6], and respect for a pluralistic society and non-discrimination, tolerance, justice, solidarity, and equality between women and men should be included as fundamental principles in the new constitution of the state.

(b) Moreover, it should be acknowledged that EU citizenship should be taken seriously, especially for those citizens of the seceding state who are residing in other EU countries. The denial of internal enlargement for EU citizens residing abroad would mean the immediate loss of rights connected to it that ensure non-discrimination in terms of access to rights (social but also political and civil) on the basis of nationality and the inability of sedentary ex-EU citizens to keep their European status. EU continuity should be guaranteed because the consequence for EU citizens living in the EU and not in the seceding state would be the immediate and irrevocable loss of rights connected to that status.
Internal enlargement would protect the region's citizens in terms of continuity of EU citizenship[7]. The existence of EU citizenship puts the seceding region in a different position from that of a third country, where no EU citizenship is acknowledged. For this reason, internal enlargement should be recognized to promote a "Europe of Citizens" narrative instead of a "Europe of States" narrative.

(c) Finally, European institutions must consider the pro-European desire to remain inside a supranational political organization because the process of federalization could be reinforced by the entrance of new states whose European afflatus is much more significant than that of many existing EU member states. The greatest criticism of the EU from many quarters is that it has interrupted the process of federalization in many of the areas where it began; therefore, the emergence of new pro-European states could resume the interrupted process. Secessions from member states could be a means to propose new federalization of the EU. The question is whether the secession of a pro-European group would strengthen the Union.
Given that a secession from the Union (such as Brexit) has signified an interruption in the European integration process, it would be interesting to know if a secession "in" the Union (such as the Catalan one from Spain or the Scottish one from the UK) would generate a new wave of federalization of Europe. These secessionist processes could be good candidates for "constituting" Europe as a federation. In my opinion, "secessions in" could be the proxy for a new process of federalization. Europe could be subject to a new federalizing dynamic thanks to a proliferation of states due to internal enlargement.
The secessionist phenomenon in processes of supranational integration can represent an important factor for the softening of territorial conflicts[8]. Notably, we are seeing scenarios that already have paths of decomposition and rearticulation of state sovereignty, which register a deep attenuation of absoluteness[9]. In particular, regarding the EU, one could even go so far as to reconfigure a demand for secession from external (to the member state) to internal (to the EU), relativizing its disruptive scope[10]. By contrast, the refusal to initiate a political debate on secessionist issues in European institutional bodies—an attitude that has prevailed until

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[5] Fasone C. (2017), *Secession and the Ambiguous Place of Regions under EU Law*. In: Closa C. (ed.), *Secession from a member state and withdrawal from the European Union: troubled membership*. Cambridge: Cambridge University Press

[6] The respect for minorities is twofold, depending on the kind of minority: regarding political minorities the problem is the relation between secession and the majoritarian principle and how to guarantee the will of political minorities (two referendums in a given time?); if talking about territorial concentrated minorities, the solution become to guarantee, in the constitutional system of the new State, that same right of secession that was exercised by the old minority (cfr. C. Margiotta, *L'ultimo diritto. Teoria e storia della secessione*, Bologna, Il Mulino, 2005). From a *purely* democratic point of view, if one accepts the secession of a territorial group from a state, one must also accept the secession of another territorial group within the seceding state, and so on, accepting the recursive nature of secession.

[7] Fasone C. (2017), *Secession and the Ambiguous Place of Regions under EU Law*. In: Closa C. (ed.), *Secession from a member state and withdrawal from the European Union: troubled membership*. Cambridge: Cambridge University Press.

[8] Cfr. Gennaro Ferraiuolo, *Le vicende della Catalogna al cospetto dei paradigmi analitici della secessione*, In Fabio Marcelli, *Il problema catalano tra diritto a decidere ed autodeterminazione*, Editoriale Scientifica, 2020, pp. 111 e ss.

[9] Ivi, p. 117.

[10] cfr. N. Maccormick, Questioning Sovereignity. Law, State, and Nation in the European Commonwealth, Oxford, 1999, trad. it. La sovranità in discussione. Diritto, stato e nazione nel «commonwealth» europeo, Bologna, 2003,pp. 325 ss.; N. Krish, Catalonia's Independence: A Reply to Joseph Weiler, in www.ejiltalk.org, 18 gennaio 2013.

now—could only result in the reaffirmation of the state-centric vision far from the perspective of a deeper political integration of the EU.

2. The democratic framework seems to be the most attractive for the recent European secessionist movements; therefore, it would be important to indicate the minimum requirements that an aspiring seceding territory should have to apply for EU accession afterward.
Importantly, the lawfulness of the secession can permit a smooth transition from secession to a new member state[11]. Not all secessions are lawful, as highlighted by the Canadian Supreme Court's landmark decision on the secession of Québec. However, if a set of common principles can be identified for a secession to be lawful, then a seceding territory could be accepted as an EU member state.
The EU's response to internal enlargement should depend on how the secession is achieved and how to define that achievement legally. The legal and political consequences of a declaration of independence depend on the way in which the new state was born. Certainly, recent practice seems to show that respect for the democratic principle is necessary yet not sufficient to absorb the secessionist process.
At present, the TEU recognizes the right of member states to secede from the Union, but there are no specific rules on secession. Separation is still subject to the existing rules of international law and the constitutional arrangements of member states. Thus, it is still necessary to consider these legal orders to develop talk of secession in terms of legality. Even if there are differences among EU member states, there should be principles shared among most EU countries that permit the definition of what a lawful secession process would look like in the EU according to the common constitutional traditions of its member states and international law. The procedure cannot be unilateral on the part of the seceding territory without the involvement of the central government, and the procedure itself (whether it leads to a formal constitutional amendment or not) must be agreed upon among the parties, regardless of its outcomes. Additionally, it must follow democratic principles through the involvement of the people via a national or regional referendum (or both) with the rule of law.
Exploring the question of the legality or illegality of secession is necessary to avoid simply admitting that law cannot address secessionist crises[12] and that it is instead determined by power politics.[13]
Therefore, it is necessary to ask whether the issue of legality when referring to secession can be discussed in terms of *liminal legality*, residing on the border between internal and international legal order, and if this legality, while waiting for EU law to govern internal secession, is sufficient to legitimize EU internal enlargement.
At present, the problematic dimension of legality in the secessionist process is still found between constitutional and international law. According to the Canadian Supreme Court, "A failure of the duty to undertake negotiations and pursue them according to constitutional principles may undermine that government's claim to legitimacy, which is generally a precondition for recognition by the international community."[14] In the opinion of the Court, after a referendum of independence is successful, the secessionist movement cannot declare unilateral secession; however, a state cannot "remain indifferent to the clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada," and "the rights of other provinces and the federal government cannot deny the right of the government of Québec to pursue secession, should a clear majority of the people of Québec choose that goal, so long as in doing so, Québec respects the rights of others."[15]
Following this well-known opinion reference of the Supreme Court of Canada,[16] it is now necessary to admit that the expression of popular will through a referendum (free and open to all) in favor of secession cannot leave the central state indifferent. Rather, after a vote in favor of secession by part of the state, the central state is obliged to enter into negotiations with the group that intends to separate, and these negotiations do not necessarily have to result in secession. The Court, while not recognizing an obligation for the state to accept a unilateral declaration of independence, does not deny that a state should allow separation in cases where a clear majority in a given region supports that request. Based on the reference of the Canadian Court,

[11] C. Fasone, cit., p. 65.
[12] In this sense, we should admit that law, accepting social facts, is following them and not coming first.
[13] Matt Qvortrup, 'Referendums on Independence, 1860–2011' 1 *The Political Quarterly* 57, Matt Qvortrup, 'The «Neverendum»?: A History of Referendums and Independence' (2013) 2 *Political Insight* 4, and M.Qvortrup, *Independence referendums. History, legal status and voting behaviour*, in Closa C., Margiotta C. and Martinico G. (eds), *Between Democracy and Law: The Amorality of Secession*, London, Routledge, 2019. One of the reasons why the Canadian Reference on Quebec must be considered an important message of hope is because it recognizes a fundamental role of the law in cases of secession: Giuseppe Martinico in Closa C., Margiotta C. and Martinico G. (eds), *Between Democracy and Law: The Amorality of Secession*, London, Routledge.
[14] Canadian Supreme Court, Reference Re Secession of Quebec [1998] 2 S.C.R. 217, para. 103.
[15] Canadian Supreme Court, Reference Re Secession of Quebec [1998] 2 S.C.R. 217, para. 87.
[16] See Delledonne, Giacomo and Martinico, Giuseppe (eds.), *The Canadian contribution to a Comparative Constitutional Law of Secession: Legacies of the Quebec Secession Reference*, Palgrave, Basingstoke, 249-263..

we can deduce that, when there is an obligation for the central state to diligently search for a political solution to the crisis, the secessionist group must not declare independence before the end of negotiations.
My view differs on the Canadian reference because I maintain that *if and only if* the process through which the separatist movement arrived at a referendum was legitimate and agreed to by all parties[17] then what I call *liminal legality*[18] would allow something different from what was recommended by the Canadian Court. It would allow for (a) the inevitability of secession following a referendum in favor of independence, no matter how the negotiations are going or have gone, and (b) the possibility for the secessionist group, after a vote with a clear majority in favor of secession, to declare independence immediately, even before the end of negotiations, and provide the possibility for the new state to enter the EU as a member state before being recognized by the parent state.
The test of *liminal legality* between an internal legal system and the international order could occur when the process through which secession is or was pursued is legitimate and respects the democratic principle. The Scottish case is an excellent example of the secession process through the accomplishment of a consensual referendum.[19] In my opinion, the *legality* of the Scottish secession would have certainly allowed Scotland's entry into the EU as a new member state in the case of successful Scottish independence.

3. The remaining problem is the question of which democratic rules are useful for the European system to prove the *internal* lawfulness of secession[20]. It would be necessary to understand if and how it is possible to democratically determine the external borders of a new state and which instruments would be appropriate for that to oblige the central state to tolerate a possible secession. Herein lie the problems of the (difficult) relationship between secession and democracy[21] and the value of the majority rule and the referendum in the secessionist process.[22] When referring to the definition of new external borders, can majority rule and a referendum be considered respectful of the accepted democratic principles?[23] The majority is known as an artificial rather than a neutral concept[24] that can be constructed through political and legal decisions by including or excluding people or groups from the right to vote.
Particularly in the EU, secession should be pursued in compliance with the fundamental values of the EU, such as democracy, the rule of law (Article 2 TEU), and compliance with Article 2 TEU. Additionally, the common constitutional traditions of a seceding territory cannot be assessed by only considering the democratic functioning of the institutions within it and their respect for the rule of law[25]. To accede to the EU, the entire process leading to secession on the part of the seceding territory must be accomplished according to the principles enshrined in Article 2 TEU and derived from Article 6(3) TEU[26].
A good starting point would certainly be the EU becoming an actor of a process of proceduralization, promoting good procedural practices for secessionist crisis. In promoting the rule of law, the EU could suggest a common proceduralization of secessionist processes in order to peacefully address the sovereignty conflicts inside EU, to make these processes legal and to avoid the escalation of conflicts. Any alternative to conflict is procedure. Subjecting secession to a legal regulation could avoid a prevalence of the force of the normative power of the factual. The capacity to neutralise secessionist crisis and its potentially destabilising elements - keeping alive

[17] Joxerramon Bengoetxea, cit., : "The conditions regulating the process of self-determination or the right to decide need to be agreed to by the relevant actors involved for the process to have any relevant consequences."
[18] Margiotta C. (2019), An update on secession as the "ultimate right". For a liminal legality, in Closa C., Margiotta C. and Martinico G. (eds), *Between Democracy and Law: The Amorality of Secession*, London, Routledge.
[19] The franchise for the election, for example, did not include Scottish citizens overseas or those living in the rest of the UK. For many, the exclusion of these voters was not justified, and it violated established democratic principles. To the contrary, 16- and 17-year-olds were able to vote. Palermo, *2019,* at 274 argues that "The outcome of the referendums on Scottish independence in 2014 and on Brexit in 2016 were largely determined by the definition of the eligible voters."
[20] On this see F. Palermo intervention in this volume.
[21] Margiotta C. (2019), *Secessione-democrazia. Un nesso in discussione*, in *Secessioni. Politica, storia, diritto*, a cura di C. Margiotta – G. Zaccaria, Padova, Padova University Press.
[22] Stéphane Beaulac and Frédéric Bérard, *The Law of Independence: Quebec, Montenegro, Kosovo, Scotland, Catalonia* (Lexisnexis, 2017); Reuven Ziegler, Jo Shaw and Rainer Bauböck (eds), *Independence referendums: who should vote and who should be offered citizenship?* (2014) RSCAS Working Paper 2014/90, http://cadmus.eui.eu/bitstream/handle/1814/32516/RSCAS_2014_90.pdf.
[23] Democracy means more than simple majority rule, as specified by the Supreme Court of Canada: Canadian Supreme Court, Reference Re Secession of Quebec [1998] 2 S.C.R. 217.
[24] G. Martinico, Constitutionalists' guide to the populist challenge. Lessons from Canada, in Closa C., Margiotta C. and Martinico G. (eds), *Between Democracy and Law: The Amorality of Secession*, London, Routledge, 2019.
[25] C. Fasone, cit., p. 62.
[26] *Ibidem* and C. Closa, '*Secession from a Member State and EU Membership: the View from the Union'*, European Constitutional Law Review12 (2016), 240–264.

the systemic structure of the legal order – should be demonstrated, since law somehow always needs to follow the facts, and that facts are the intra-European demands of secession.